SUPREME COURT

APR 11

MICHAEL RODAK, JR.

No. 73-1134

In the Supreme Court of the United States

OCTOBER TERM, 1973

PBW STOCK EXCHANGE, INC., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 485 F. 2d 718.

JURISDICTION

The judgment of the court of appeals, granting the motion of the Securities and Exchange Commission ("Commission") to dismiss the petitions for review for lack of jurisdiction, was entered on September 28, 1973. A petition for rehearing *en banc* was denied on

[1] References to the Appendices annexed to the petition for a writ of certiorari are cited as "Pet. App." References to the petition are cited as "Pet."

October 31, 1973. The petition for a writ of certiorari was filed on January 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a rule promulgated by the Securities and Exchange Commission establishing new standards for utilization of securities exchange memberships, which is applicable to all national securities exchanges, to the more than 5,000 persons holding memberships on those exchanges and to any and all future members of such exchanges, is directly reviewable in a court of appeals, pursuant to a statutory provision for review of Commission orders.

STATUTES INVOLVED

Sections 2, 6, 11, 17(a) and 23(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78b, 78f, 78k, 78q(a) and 78w(a), are set forth at pages 19–26, *infra*. Sections 19(b) and 25(a) of the Securities Exchange Act, 15 U.S.C. 78s(b) and 78y(a), and Section 10 of the Administrative Procedure Act, as codified, 5 U.S.C. 702–704, are set forth at Pet. App. C.

STATEMENT

1. On January 16, 1973, the Commission adopted Securities Exchange Act Rule 19b–2, 17 C.F.R. 240. 19b–2, pursuant to its authority under Sections 2, 6, 11, 17, 19 and 23 of the Securities Exchange Act.[2]

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[2] The Commission announced the adoption of Rule 19b–2 in Securities Exchange Act Release No. 9950 (Jan. 16, 1973) ("Release"), 38 Fed. Reg. 3901 (Feb. 8, 1973), copies of which are being lodged with this Court.

As both the majority and dissenting opinions below found,[3] Rule 19b–2, on its face and by its explicit terms, establishes new standards for the utilization of exchange memberships and is applicable to all national securities exchanges registered with the Commission,[4] to the more than 5,000 persons holding memberships on those exchanges, and to any and all future members of those exchanges.

The PBW Stock Exchange, Inc. ("PBW") and certain of its members sought review of Rule 19b–2 in the court of appeals pursuant to Section 25(a) of the Securities Exchange Act and the judicial review provisions of the Administrative Procedure Act, as codified at 5 U.S.C. 702–706. The court granted the Commission's motion to dismiss the petitions for lack of jurisdiction on the grounds that Section 25(a) authorizes direct appellate review only of the Commission's quasi-judicial orders,[5] and that the Administrative Procedure Act does not contain any separate grant of authority permitting direct appellate, as opposed to district court, review of quasi-legislative rulemaking.[6] It expressly refused to foreclose any rights the petitioners might have to pre-enforcement or other district court review of Rule 19b–2.[7]

2. Prior to the adoption of Rule 19b–2, the various national securities exchanges followed differing and inconsistent policies concerning the appropriate utili-

[3] See, *e.g.*, Pet. App. A, pp. 4, 5, 27, 28, 33, n. 9, 59.

[4] There are 13 exchanges registered with the Commission pursuant to Section 6 of the Securities Exchange Act.

[5] Pet. App. A, pp. 7–8. See, also, *id.*, at pp. 10–16.

[6] *Id.*, at p. 6.

[7] *Id.*, at pp. 7 n. 3, 29–30.

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zation of exchange memberships, resulting, among other things, in the fragmentation of securities markets for exchange-listed securities.[8] Some exchanges including, to some degree, the PBW,[9] refused to permit brokers and dealers affiliated with certain financial institutions (such as banks, for example) to obtain membership on the exchange, without regard to the purpose for which such membership might have been sought—the so-called "parent test."[10] On the other hand, a number of the exchanges, including the PBW, permitted most persons or entities to obtain exchange memberships, to the extent these were available,[11] even though these memberships might be utilized solely, or primarily, for the benefit of the member or its affiliate, and not for the benefit of the investing public generally.

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[8] See, *e.g.*, Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on Study of the Securities Industry, Part 6, 92d Cong., 2d Sess. 2962–2963. It was there shown that as a result, for example, an offer of securities at a particular price in one market might not be accepted at that price, even though there was an outstanding bid at that price in another market in which the same securities were traded.

[9] PBW Stock Exchange Constitution, Art. XIV, Sec. 3, CCH. *PBW Stock Exchange Guild*, ¶ 1328, p. 1093.

[10] See, *e.g.*, 2 CCH. *New York Stock Exchange Guide*, ¶ 2318. The "parent test" required that the "parent" of any exchange member have as its primary purpose the transaction of business as a broker or dealer in securities. See, also, Release, at pp. 90–96.

[11] The constitutions of the various exchanges limit the total number of memberships available, as this Court has recognized might be proper under the Securities Exchange Act. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 349–350.

Rule 19b–2 is a product of extensive studies by the Commission of the structure, viability and fairness of the nation's securities markets. These are summarized in the Release (pp. 10–36) adopting the Rule. They included a detailed inquiry into the practices of exchanges in fixing minimum commission rates for their members to charge, a major study to determine the effect of institutional investors upon the fairness, orderliness and honesty of the securities markets, and a probing analysis of the structure of the markets. They led to the issuance by the Commission of a *Statement on the Future Structure of the Securities Markets,*[12] committing the Commission to a program of upgrading competition in the securities industry and otherwise implementing the concept, enumerated by the Congress that enacted the Securities Exchange Act [13] and recognized by this Court in *Silver* v. *New York Stock Exchange,*[14] that exchange memberships should be utilized for public, and not private, purposes. Pursuant to that program the Commission, in May 1972,[15] requested all registered exchanges to adopt, no later than July 31, 1972, the substance of a proposed rule governing the appropriate utilization of exchange memberships.[16] On August 3,

[12] G.P.O. ed., Feb. 2, 1972.

[13] H. Rep. No. 1383, 73d Cong., 2d Sess. 15.

[14] 373 U.S. at 349.

[15] Securities Exchange Act Release No. 9623 (May 30, 1972).

[16] While the Commission relied upon its broad authority under Securities Exchange Act Sections 2, 6, 11, 17 and 23, to adopt rules governing trading by exchange members, it nevertheless denominated its rule "Rule 19b–2," relying on Section 19(b) for additional authority to act, and utilizing the procedures called for by that section, to make clear its view that the concept of

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1972, after it had become apparent that most of the exchanges had not adopted the rule,[17] the Commission published proposed Rule 19b–2 for public comment, to determine whether to adopt a rule governing the utilization of exchange membership for other than public purposes.[18] Thereafter, oral hearings on the Commission's proposed rule were held at which petitioners and other interested persons presented their views directly to, and were questioned by, the Commission and its staff. On January 16, 1973, nearly five years after its inquiry began, and after receiving more than 10,000 pages of documents and at least 5,000 pages of testimony, the Commission adopted Rule 19b–2.

The Rule generally provides that membership on national securities exchanges should be made available to any person or entity committed predominantly to competing for the public's securities business.[19] An exchange member is deemed in compliance with the

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cooperative self-regulation embodied in the Securities Exchange Act was still viable. See Release, at p. 72, where the Commission stated:

"We view Section 19(b) as the specific embodiment of the philosophy of supervised self-regulation upon which much of the Securities Exchange Act has been predicated."

See, also, *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 352; *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, No. 72–312, decided, December 4, 1973.

[17] The court below, in noting (Pet. App. A, p. 7) that most of the exchanges did not adopt the proposed rule, found this fact to stand in sharp contrast to petitioners' assertion (Pet., p. 5) that only the PBW was affected by, and opposed to, the Commission's Rule (Pet. App. A, p. 27).

[18] Securities Exchange Act Release No. 9716 (Aug. 3, 1972), 37 Fed. Reg. 16409 (Aug. 12, 1972).

[19] Rule 19b–2(a), Pet. App. B, p. 63.

Rule if at least 80 percent of the value of its exchange securities transactions, whether as a broker or dealer, are effected for or with persons other than the member or its affiliates,[20] or are within a class of transactions, specified in the rule, designed to contribute to the liquidity and stability of securities markets.[21]

Thus, Rule 19b–2 is designed to provide a new policy and to help establish a central market system for listed securities, which the Commission has proposed[22] and which two subcommittees of Congress[23] as well as the Department of the Treasury[24] have endorsed.

In its 195-page release announcing the adoption of Rule 19b–2, the Commission set forth detailed analyses of the background of the Rule, the regulatory objectives of the Securities Exchange Act applicable to the

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[20] *Ibid.* An affiliate of an exchange member generally is defined as any person or entity controlling, controlled by or in a control relationship with the exchange member. Rule 19b–2(b).

[21] Rule 19b–2(a)(1) through (a)(8). Pet. App. B. pp. 63–64. These types of transactions have been recognized to aid the liquidity and stability of securities markets in other contexts. See Securities Exchange Act Rule 11a–1, 17 C.F.R. 240.11a–1, and H.R. 5050, Section 205, 93d Cong., 1st Sess. (1973).

[22] See Release, *supra*, at p. 2, n. 4, and authorities cited therein. See also, *Policy Statement of the Securities and Exchange Commission on the Structure of a Central Market System* (Mar. 29, 1973).

[23] Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Report of the Securities Industry Study*, S. Doc. No. 93–13, p. 89 (1973); Subcommittee on Commerce and Finance of the House of Representatives Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., *Report of the Securities Industry Study*, H. Rep. No. 92–1519 (1972).

[24] Department of the Treasury, *Public Policy for American Capital Markets* (Feb. 7, 1974).

Commission's action, the statutory authority for the Rule, the bases for the procedures employed in adopting the Rule, the necessity for the Rule and an analysis of competitive considerations surrounding the Rule.

Among other things, the Commission indicated that the various exchange rate, access and membership policies under study had resulted in the fragmentation of the securities markets, which in many cases precluded public investors from obtaining the best execution for their particular orders on securities traded in more than one market.[25] The Commission noted that its Rule was designed to effectuate the Commission's policy determination that competition among the various exchange markets should be fostered and based on rational factors, such as securities price, execution and other matters, rather than upon the allocation of brokerage commissions to persons other than those participating in the securities transactions.[26] It noted that essential to the central market system it is attempting to bring about is the requirement that all exchange markets be subject to certain uniform regulations, especially on the issue of exchange membership,[27] and that by adopting Rule 19b–2, it was taking the first step to create such uniformity.

ARGUMENT

The sole question decided by the court of appeals, and the only issue presented for review, is whether petitioners have a right to pre-enforcement review of

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[25] Release, *supra*, at pp. 90–108.
[26] *Id.*, at pp. 167–188.
[27] *Id.*, at p. 80, n. 251.

Rule 19b–2 in a court of appeals. Under the Administrative Procedure Act, petitioners presumably can obtain limited pre-enforcement review in a district court if they can demonstrate that the Commission's Rule "requires an immediate and significant change in the * * * [petitioners'] conduct of their affairs with serious penalties attached to noncompliance, * * *" *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 153.[28] The decision of the court of appeals correctly interprets the applicable statutory provisions respecting direct appellate judicial review and is consistent with prior decisions of this Court and other courts of appeals. There is, therefore, no occasion for review by this Court.

1. The jurisdiction of the federal courts of appeals is limited to those matters expressly prescribed by statute. See, *e.g.*, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Central States Co.* v. *Muscatine*, 324 U.S. 138. The court below correctly held that in enacting Section 25(a) of the Securities Exchange Act of 1934, (1) Congress intended to give those courts direct appellate jurisdiction only over quasi-adjudicatory determinations of the Commission—its orders; and (2) Congress did not intend that those courts should have direct appellate review over quasi-legislative actions taken by the Commission—its rules.

Section 25(a) provides in relevant part:

> Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States * * *

[28] The Commission does not concede that these tests could be met in this case.

In limiting this Section to review of Commission orders, as distinguished from rules and regulations, Congress was acutely aware of the distinction it was making,[29] and the legislative history of both Sections 19(b) and 25(a) emphasizes the congressional commitment to this distinction.[30]

Section 18(b) of H.R. 9323,[31] the forerunner of present Section 19(b) of the Securities Exchange Act, as originally proposed, authorized the Commission to alter, amend or modify the rules, practices or policies of registered national securities exchanges only by "rule or regulation." The debates in the House of Representatives indicate that a minority of the members of that body were opposed to this provision solely because the Commission's ability to act with respect to exchange rules was granted in quasi-legislative terms.

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[29] For example, in Section 6(a), dealing with the registration of exchanges, the data the exchanges are to set forth in their registration applications are to be prescribed by "rules and regulations," while in Section 6(c), the grant or denial of registration is to be by "order." Under Sections 11, 17 and 23(a), the Commission is authorized to act by "rules and regulations" only. Section 19(b) is the only provision of the Act, pursuant to which the Commission adopted Rule 19b-2, which accords the Commission the alternative of acting either "by rules or regulations or by order * * *."

[30] See *A. F. of L.* v. *National Labor Relations Board*, 308 U.S. 401, 408:

"We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the 'order' for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions."

See also *Heikkila* v. *Barber*, 345 U.S. 229, 233; *Ludecke* v. *Watkins*, 335 U.S. 160; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Stark* v. *Wickard*, 321 U.S. 288.

[31] H.R. 9323, 73d Cong., 2d Sess., Section 18(b).

Congressman Hamilton Fish offered an amendment to strike from that section the words "rules and regulations," and substitute in their place the word "order," to insure judicial review, pursuant to Section 25(a), of Commission action under Section 19(b).[32] The proposed amendment was rejected [33] precisely because, as the court of appeals held (Pet. App. A, p. 14), the majority did not want to subject Commission rules to direct appellate review and possible modification by the court. While the Senate version of the bill originally had provided that the Commission could act only by "order" when exercising its power to require exchanges to alter, amend or modify their rules, policies and practices,[34] in conference Section 19(b) was amended to authorize the Commission to proceed by "rule or regulation or by order." [35]

At the same time that it considered the Commission's rulemaking authority with respect to regulation of exchanges, Congress also considered whether to expand the scope of the judicial review provisions of the Act. All the early drafts of this legislation, as well as the bill ultimately enacted, limited direct statutory appellate review of Commission action to Commission "orders." [36] During the Senate hearings, repre-

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[32] See 78 Cong. Rec. 8087, summarized and discussed by the court below at Pet. App. A, pp. 10–13.

[33] 78 Cong. Rec. 8093.

[34] S. 3420, 73d Cong., 2d Sess., Section 19(b).

[35] H. Rep. No. 1838, 73d Cong., 2d Sess. 37.

[36] H.R. 8720, 73d Cong., 2d Sess., Section 24; H.R. 7852, 73d Cong., 2d Sess., Section 23; H.R. 9323, 73d Cong., 2d Sess., Section 24; S. 2693, 73d Cong., 2d Sess., Section 23; S. 3420, 73d Cong., 2d Sess., Section 24.

sentatives of the New York Stock Exchange, directly concerned with the broad grant of rulemaking authority over exchange rules and practices given the Commission, suggested that what is now Section 25(a) be amended to permit direct appellate review of Commission rules and regulations as well as orders.[37] These suggestions were rejected because the Congress did not want to put the Commission "in the position of making rules and regulations for which a court may provide a substitute * * *."[38]

While the judicial review provisions of the Administrative Procedure Act may have expanded, to some extent, pre-enforcement review of administrative rulemaking,[39] they did not give the courts of appeals direct appellate jurisdiction to consider such matters. Where, as here, there is no separate statutory grant of jurisdiction authorizing appellate courts to review administrative rulemaking, to the extent judicial review is available it is available in a district court.[40]

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[37] See Hearings before the Senate Committee on Banking and Currency, on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.), pt. 16, pp. 7569–7572, 72d Cong., 2d Sess., and 73d Cong., 1st and 2d Sess.

[38] *Ibid.* If Commission rules were reviewable pursuant to Section 25(a), this Congressional intent would have been thwarted. Section 25(a) expressly authorizes the courts of appeals "to affirm, *modify*, and enforce or set aside [*a Commission*] *order in whole or in part*" (emphasis supplied.) Cf. *Sierra Club* v. *Morton*, 405 U.S. 727, 740.

[39] *Heikkila* v. *Barber*, 345 U.S. 229, 232–233.

[40] See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 n. 3; *City of Dallas* v. *Rentzel*, 172 F. 2d 122 (C.A. 5), certiorari denied, 338 U.S. 858; *Schwab* v. *Quesada*, 284 F. 2d 140 (C.A. 3); *Rettinger* v. *Federal Trade Commission*, 392 F. 2d 454 (C.A. 2); *Arizona State Dept. of Public Welfare* v. *Department of Health, Education, and Welfare*, 449 F. 2d 456, 464 (C.A. 9), certiorari denied, 405 U.S. 919.

2. In light of the plain language and legislative history of the Securities Exchange Act (discussed *supra*, pp. 10–12; Pet. App. A, pp. 10–16), the decision of the court of appeals (*id.*, at pp. 7–9)—recognizing that Congress gave the Commission a measure of procedural discretion to act by rule or by order in dealing with important regulatory problems—is neither unique nor inconsistent with applicable judicial precedent, as petitioners argue (Pet., pp. 8–10).

In *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court recognized that administrative agencies, like the Commission, often can effect the same policies either through rulemaking or adjudication. Rather than finding this troublesome, as petitioners urge, this Court there reaffirmed the principle, followed by the court below, that (*id.* at 203)

> * * * the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

The fact that this "discretion" may lead to different procedures and, ultimately, different modes of judicial review, was recognized in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421, upon which petitioners rely:

> As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review.

Petitioners' reliance on *Columbia Broadcasting*, *supra*, *Frozen Food Express* v. *United States*, 351 U.S. 40, and *Abbott Laboratories* v. *Gardner*, 387 U.S.

136, is thus misplaced. None of those cases involved the question of direct review in the court of appeals of agency regulations.[41] The issue in each was whether there could be pre-enforcement review in any court. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, involving the same question, the issue as to the appropriate court does not appear to have been presented. Moreover, both *Columbia Broadcasting* and *Storer* involved review of agency regulations promulgated by "orders," as required by the statutory provisions relevant to the Federal Communications Commission. This was noted in *Columbia Broadcasting, supra,* 316 U.S. at 418 (emphasis supplied):

> Such regulations have the force of law before their sanctions are invoked as well as after. *When, as here, they are promulgated by order of the Commission and* the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act.

The legislative history of the Securities Exchange Act demonstrates that, unlike the Federal Communications Commission (and other agencies involved in the cases cited by petitioners) whose rules must be adopted by "order," the Securities and Exchange

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[41] As this Court's opinion in *Columbia Broadcasting* makes clear, under Section 402 of the Federal Communications Act of 1934, pursuant to which review was sought, orders adopting quasi-legislative rules of the Federal Communications Commission were reviewable only in a three judge district court under the Urgent Deficiencies Act, while adjudicatory orders of the Commission were reviewable in a court of appeals. The review permitted in both *Frozen Foods Express* and *Abbott Laboratories* was in a district court.

Commission was explicitly not required to adopt its rules by "orders":

> If you are going to say that the Commission may do this by rules and regulations, that is one thing. If you are going to say that the Commission shall formulate rules and regulations *and issue them in the form of orders*, that is another thing; and every one of them could be tied up in the courts from 12 to 24 months and thus absolutely negative the very things we have done in the preceding forty-odd pages of this bill.

78 Cong. Rec. 8093 (1934) (Remarks of Rep. Rayburn, emphasis supplied). See, also, *id.* at 8090–8092. See, also, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627; *Division of Production, American Petroleum Institute* v. *Halaby*, 307 F. 2d 363 (C.A. 5).[42]

[42] In *Halaby*, the Federal Aviation Agency Administrator promulgated regulations requiring persons planning to build structures over a certain height to furnish notice. The relevant statute, similar to Section 19(b) of the Securities Exchange Act, authorized the Administrator to proceed in this area "by rules and regulations, or by order." In dismissing a petition for review of the Administrator's rules, the court of appeals held that the relevant statutory provision authorized it to review only "orders" of the Administrator and that the court therefore lacked jurisdiction to review the rules and regulations there challenged. *Id.* at 365. In response to arguments similar to those raised here by petitioners, the court in *Halaby* noted:

> "If, as contended by the petitioners, the regulations are not authorized, and result directly in irreparable injury to the petitioners and their members, there may be a remedy by original action in a federal district court in which an adequate record can be made. That was the course followed in Columbia Broadcasting System, Inc. v. United States * * *. Whether or not such a remedy is available cannot be decided

(Continued)

Contrary to petitioners' assertion, the decision of the court of appeals is not in conflict with decisions of the Court of Appeals for the District of Columbia Circuit. In *Philadelphia Company* v. *Securities and Exchange Commission*, 164 F. 2d 889 (C.A.D.C.), certiorari denied, 333 U.S. 828, the court held that a Commission directive, denominated a rule, was in fact an adjudicatory order applicable to a single holding company system and therefore reviewable. As noted at pp. 17–18, *infra*, here the court of appeals held Rule 19b–2 to be a quasi-legislative rule of general application.[42]

While the District of Columbia Circuit authorized pre-enforcement review in the court of appeals in *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F. 2d 912 and *City of Chicago* v. *Federal Power Commission*, 458 F. 2d 731, certiorari denied, 405 U.S. 1074, in both cases the court limited its holding to situations where there was an unambiguous concession by petitioners that there was no factual dispute and the only issues were questions of law.[43] In contrast to those cases, here petitioners raise a number of factual

(Continued)

in the present proceeding. We hold only that there is no right of direct review in this Court * * *. The petition is dismissed for lack of jurisdiction."

Id. at 365–366.

[43] The court of appeals noted (Pet. App. A. p. 28, n. 15):

"Of course, if a court were confronted with a situation in which the Commission attempted to cloak clearly quasi-judicial action in quasi-legislative garb, different factors might militate in favor of this court's review. We are not faced with such a situation in the instant case."

[41] To the extent that *Medical Committee for Human Rights* v. *Securities and Exchange Commission*, 432 F. 2d 659 (C.A.D.C.), vacated as moot, 404 U.S. 403, has any continuing viability, it

(Continued)

issues, including whether Rule 19b–2 is directed solely at them (Pet., pp. 3–6).[45]

3. The court of appeals concluded (Pet. App. A, p. 28) that Rule 19b–2 was a rule because it (1) "applies to all members of all exchanges, not just to PBW and its members"; (2) "provides specific standards to regulate the future membership practices of the exchanges rather than focusing on the past practices of any particular exchange"; and (3) is "prospective [in] application and applicable across the board * * *." In so ruling, the court below properly adhered to the distinction between rules and orders enunciated by this Court as long ago as 1908 and as

(Continued)

supports, rather than conflicts with, the decision of the court below. The agency action there involved did not purport to be a rule or regulation; it involved the Commission's approval of a staff "no action" position which the court of appeals determined was final agency action that adjudicated rights of the petitioner in that case and was therefore reviewable under Section 25(a) of the Securities Exchange Act. Similarly, *Independent Broker-Dealers' Trade Association* v. *Securities and Exchange Commission*, 442 F. 2d 132, 143, (C.A.D.C.) certiorari denied, 404 U.S. 828, stated that "limited judicial" review of the action taken by the Commission in that case could be had only in a district court, not in a court of appeals, since "Section 25(a) applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts * * *." The district court had dismissed the attempt to review the Commission's action on the ground that the plaintiff did not have standing; the dismissal was vacated, but the case was remanded with instructions that a summary judgment on behalf of the Commission be entered because the review sought went beyond the questions of the Commission's "power to act" and "elemental fairness." 442 F. 2d at 143.

[45] While the court below disputed this assertion (Pet. App. A, p. 28), it noted that:

"Such questions are better resolved by a forum whose function is fact-finding, a function which the court of appeals in the first instance is singularly ill-equipped to perform."

recently as last year. As this Court consistently has recognized with respect to the functions of administrative agencies:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[46]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[46] *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226. Cf. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445–446; Attorney General, *Manual on the Administrative Procedure Act* 14 (1947); 5 U.S.C. 551(5) and 551(6); *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 245–246.

Accord, *Columbia Broadcasting System, supra; American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 629–630 (C.A. D.C.) (*en banc*), certiorari denied, 385 U.S. 843; *Air Line Pilots Ass'n* v. *Quesada*, 276 F. 2d 892, 895–896 (C.A. 2); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 693–694 (C.A. 9).

APPENDIX

THE SECURITIES EXCHANGE ACT OF 1934, 48 STAT. 881, AS AMENDED, 15 U.S.C., 78a *et seq.*:

Section 2, 15 U.S.C. 78b:

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

Section 6, 15 U.S.C. 78f:

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

Section 11, 15 U.S.C. 78k:

(a) The Commission shall prescribe such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, (1) to regulate or prevent floor trading by members of national securities exchanges, directly or indirectly for their own

account or for discretionary accounts, and (2) to prevent such excessive trading on the exchange but off the floor by members, directly or indirectly for their own account, as the Commission may deem detrimental to the maintenance of a fair and orderly market. It shall be unlawful for a member to effect any transaction in a security in contravention of such rules and regulations, but such rules and regulations may make such exemptions for arbitrage transactions, for transactions in exempted securities, and, within the limitations of subsection (b) of this section, for transactions by odd-lot dealers and specialists, as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

(b) When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonably necessary to carry on such odd-lot transactions, and/or (2) a member to be registered as a specialist. If under the rules and regulations of the Commission a specialist is permitted to act as a dealer, or is limited to acting as a dealer, such rules and regulations shall restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market, and/or to those necessary to permit him to act as an odd-lot dealer if the rules of the exchange permit him to act as an odd-lot dealer. It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist

who may be acting for such specialist: but the Commission shall have power to require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist acting as a broker to effect on the exchange any transaction except upon a market or limited price order.

(c) If because of the limited volume of transactions effected on an exchange, it is in the opinion of the Commission impracticable and not necessary or appropriate in the public interest or for the protection of investors to apply any of the foregoing provisions of this section or the rules and regulations thereunder, the Commission shall have power, upon application of the exchange and on a showing that the rules of such exchange are otherwise adequate for the protection of investors, to exempt such exchange and its members from any such provision or rules and regulations.

(d) It shall be unlawful for a member of a national securities exchange who is both a dealer and a broker, or for any person who both as a broker and a dealer transacts a business in securities through the medium of a member or otherwise, to effect through the use of any facility of a national securities exchange or of the mails or of any means or instrumentality of interstate commerce, or otherwise in the case of a member, (1) any transaction in connection with which, directly or indirectly, he extends or maintains or arranges for the extension or maintenance of credit to or for a customer on any security (other than an exempted security) which was a part of a new issue in the distribution of which he participated as a member of a selling syndicate or group within thirty days prior to such transaction: *Provided,* That credit

shall not be deemed extended by reason of a bona fide delayed delivery of any such security against full payment of the entire purchase price thereof upon such delivery within thirty-five days after such purchase, or (2) any transaction with respect to any security (other than an exempted security) unless, if the transaction is with a customer, he discloses to such customer in writing at or before the completion of the transaction whether he is acting as a dealer for his own account, as a broker for such customer, or as a broker for some other person.

(e) The Commission is directed to make a study of the feasibility and advisability of the complete segregation of the functions of dealer and broker, and to report the results of its study and its recommendations to the Congress on or before January 3, 1936.

Section 17(a), 15 U.S.C. 78q(a):

Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Section 23(a), 15 U.S.C. 78w(a):

> The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

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